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No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

S.M.A. HASAN,

*Petitioner,*

versus

LYNN MARTIN, Secretary of Labor,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is a nuclear engineer who raises concerns internally to his management rather than to an external government entity, such as the U.S. Nuclear Regulatory Commission, entitled to statutory protection under Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851?

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S.M.A. HASAN,

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*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

The petitioner, S.M.A. Hasan, respectfully requests that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 7, 1992.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unpublished and is reprinted in the attached appendix at A1. The decision by the Secretary of Labor, which was affirmed by the Court of Appeals, is reprinted

in the appendix at A3. The recommended decision by the Administrative Law Judge is reprinted in the appendix at A17.

## JURSDICTION

The judgment of the Court of Appeals was entered on May 7, 1992, and this petition was filed within ninety days of that date. This Court's jurisdiction to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(a).

## STATUTORY PROVISION INVOLVED

The statute involved is 42 U.S.C. § 5851(a), which provides:

> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)
>
> > (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 et seq.] or a proceeding for the administration or enforcement of any requirement imposed

> under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding, or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 et seq.].

## STATEMENT OF THE CASE

This case arises under the federal nuclear whistleblower protection law, Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. Petitioner S.M.A. Hasan hereby seeks review of a May 7, 1992 decision of the U.S. Court of Appeals for the Fifth Circuit which affirmed the U.S. Secretary of Labor's June 26, 1991 dismissal of petitioner's nuclear whistleblower complaint.

Between January, 1982 and August, 1985, petitioner S.M.A. Hasan worked as a civil structural engineer at the Comanche Peak Steam Electric Station ("CPSES") nuclear power project, located in Glen Rose, Texas. Appendix at 19 ("A19"). Mr. Hasan was employed by Nuclear Power Services, Inc. ("NPSI"), a contractor to the owner of the plant, the Texas Utilities Electric Co. ("TUEC"). A19.

While working at the CPSES, Mr. Hasan raised numerous concerns regarding the design packages of the pipe support system. A21. The pipe support system is a significant safety related system at a nuclear power plant

and its design is closely monitored by the U.S. Nuclear Regulatory Commission ("NRC").

In August, 1985, TUEC terminated NPSI's contractor status and hired a new contractor, Stone and Webster, to perform design work on the pipe support system. A19. TUEC rated each NPSI engineer and made a recommendation as to whether Stone and Webster should rehire that engineer. With almost no exceptions, those engineers recommended for rehire were in fact rehired and those who were not recommended for rehire were released from the project. A19.

Stone and Webster interviewed Mr. Hasan and determined that he was suitable for hire. However, Stone and Webster received a recommendation of "no" hire from TUEC, which resulted in Mr. Hasan's release from the CPSES project. A19. Mr. Hasan was terminated from work at CPSES in August, 1985. A19.

The sole reason TUEC provided for the "no" hire recommendation was "because of [Mr. Hasan's] history of personality problems with co-workers." A22. TUEC's representative testified at the hearing that Mr. Hasan's personality problems with co-workers stemmed, in part, from his constant raising of internal concerns regarding the pipe support design. Testimony of Mr. Jay Ryan, Joint Appendix at 245-50. Mr. Ryan further testified that prior to making the "no" hire recommendation, he was "upset" over delays in construction that resulted from Mr. Hasan's raising of safety concerns. *Id.*

At no time while he worked at CPSES did Mr. Hasan file a formal complaint with the NRC. A22. Mr. Hasan's complaints were raised directly with his supervision. A21.

In January of 1986, Mr. Hasan re-applied for employment with Stone and Webster at the CPSES project. Although he passed his initial Stone and Webster interview, he was again not rehired due to the earlier recommendation of TUEC. A19.

On February 18, 1986, Mr. Hasan filed a complaint under Section 210 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, alleging that he was being denied employment at the CPSES because he had engaged in protected activities while stationed at CPSES. A18.

On October 21, 1987 a Department of Labor Administrative Law Judge ("ALJ"), relying, in part, on *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), issued a recommended decision holding that Mr. Hasan did not engage in protected activity, as defined under Section 210. A18. Under this Fifth Circuit case, in order to be protected under the federal nuclear whistleblower law, an employee must have direct contact with a "competent organ of government." 747 F.2d at 1036. Other U.S. courts of appeals have found that purely internal complaints, without any contact with governmental authorities, constitute protected activity under the nuclear whistleblower law. *See, e.g., Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Kansas Gas and Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478

U.S. 1011 (1986). The ALJ issued his recommended decision in accordance with 29 C.F.R. § 24.6(a). A18.

The Secretary of Labor issued a final decision on June 26, 1991 and upheld the ALJ's determination that Mr. Hasan's removal was solely caused by personality problems with co-workers. A13. The SOL did not consider whether Mr. Hasan's "personality problems with co-workers" were caused, in whole or in part, by his raising internal concerns and made no determination as to whether Mr. Hasan had engaged in "internal" protected activities. A5, n.3.

On May 7, 1992, the U.S. Court of Appeals for the Fifth Circuit affirmed the decision of the SOL. A1.

## REASONS FOR GRANTING THE WRIT

### I. The decision of the Fifth Circuit Court of Appeals creates a split in the circuit courts and is in conflict with the holdings adopted by the Second, Sixth, Ninth and Tenth Circuit Courts of Appeals.

Because there is a split in the circuit courts of appeals concerning the scope of protected activity under the federal nuclear whistleblower protection law, *certiorari* should be granted. The U.S. Court of Appeals for the Fifth Circuit, the circuit in which this case arose, is the only court of appeals which has declined to find purely internal complaints to management to constitute protected activity. This holding runs counter to the direct decisions of the Second, Sixth, Ninth and Tenth Circuits and the scope of protection afforded whistleblowers by the Nuclear Regulatory Commission ("NRC") and the Secretary of Labor.

In *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), the Fifth Circuit Court of Appeals determined that under Section 210 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, internal whistleblowing (i.e., raising safety concerns to management rather than directly to a government entity) does not constitute protected activity. At the time the Fifth Circuit rendered its decision in *Brown & Root*, it was "mindful that our holding creates a split in the circuits." 747 F.2d at 1036. Specifically, the Court noted that its holding was contrary to that of *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) and *Consolidated Edison Co. of N.Y. v. Donovan*, 673 F.2d 61 (2d Cir. 1982), both of which determined that the filing of purely internal safety disclosures constitutes protected activity under Section 210.[1]

Subsequent to Fifth Circuit's holding in *Brown & Root*, the Tenth and Sixth Circuit Courts of Appeals considered whether purely internal whistleblowing constitutes protected activity, and concluded that it does. In *Kansas Gas and Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986)[2], the Tenth Circuit specifically rejected the holding in *Brown & Root* and determined that "internal actions taken by an

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[1] Section 210 is silent on whether internal whistleblowing constitutes protected activity. The NRC's and the Secretary's interpretation is therefore entitled to substantial deference. *Avoyelles Sportsmen's League v. Marsh*, 710 F.2d 897 (5th Cir. 1983).

[2] Justices O'Connor, White and Stevens respectfully dissented from this Court's decision to deny *certiorari* in *Kansas Gas and Electric*. 478 U.S. 1011 (1986).

employee do come within the purview of employee protection as guaranteed by the respective Acts." *Id.* at 1511 (citing *NLRB v. Scrivener*, 405 U.S. 117 (1972)). The NRC, as *amicus curiae*, urged the *Kansas Gas & Electric* Court not to adopt the Fifth Circuit's reasoning in *Brown & Root*. Additionally, commentators have also taken note of the importance of protecting internal complaints under Section 210 and have criticized the Fifth Circuit's holding in *Brown & Root*. *See, e.g.*, Drachsler, *Brown and Root v. Donovan: An Exercise in Judicial Myopia*, 38 Lab. L.J. 311 (May 1987); Kohn & Carpenter, *Nuclear Whistleblower Protection and the Scope of Protected Activity under Section 210 of the Energy Reorganization Act*, 4 Antioch L.J. 73 (Summer 1986).

Most recently, in *Jones v. Tennessee Valley Authority*, 948 F.2d 258 (6th Cir. 1991), the Sixth Circuit Court of Appeals indicated that purely internal disclosure of safety concerns constitutes protected conduct under Section 210. *Id.* at 264.

Therefore, the split in the circuits is direct and this Court should grant *certiorari* to resolve the dispute.

## II. The NRC's criticism of the Fifth Circuit's *Brown & Root* decision raises an issue of national importance that needs to be addressed by this Court.

This case raises an issue of national importance that has not been, but should be, settled by this Court. The Fifth Circuit's dismissal of petitioner's appeal directly conflicts with the U.S. Nuclear Regulatory Commission's interpretation of section 210 of the ERA. On February 14, 1984, the NRC addressed the issue of internal protected

activity in NRC IE Information Notice No. 84-08. In that bulletin, the NRC noted: "There can be *no question* that the *public health and safety require* that employees be free to raise safety issues to *licensee management*. . . . " *Id.* at p. 2 (emphasis added). The NRC requested that licensees "ensure" that employees be allowed to raise complaints internally *before* an employee "feels compelled" to contact the NRC. *Id.*

In an *amicus curiae* brief filed by the NRC in *Kansas Gas and Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985) (a case involving the same questions at issue here), the Solicitor of the NRC urged the Tenth Circuit not to follow the *Brown & Root* decision and stated:

> A narrow reading of section 210 to exclude internal filings such as those underlying this case would *undermine the NRC's regulatory framework and frustrate the broad remedial purposes of Congress in adopting section 210.*

Brief of the U.S. Nuclear Regulatory Commission as *Amicus Curiae* in *Kansas Gas & Electric v. Brock*, (March, 1985), p. 16 (emphasis added). The Solicitor noted that protecting internal whistleblowing was in the "national interest" and essential for the "efficient" functioning of the NRC's "regulatory program." *Id.*

## CONCLUSION

For the above-stated reasons, petitioner respectfully requests that this Court grant his petition for writ of *certiorari*.

Respectfully submitted,

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Dated August 4, 1992

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 91-4642

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S.M.A. HASAN,

Petitioner,

versus

LYNN MARTIN, Secretary of Labor,

Respondent.

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Petition for Review of Order of
U. S. Department of Labor
(86-ERA-24)

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(Filed MAY 07, 1992)

Before POLITZ, Chief Judge, and WILLIAMS and DUHE, Circuit Judges.

PER CURIAM:*

This matter is before the court on petition for review of the decision of the Secretary of Labor rejecting the

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

claim of S.M.A. Hasan under Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. Having considered the pertinent parts of the record and the briefs and oral arguments of counsel, and finding no basis for rejecting the decision by the Secretary, the petition for review is DENIED.

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U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: June 26, 1991
CASE NO. 86-ERA-24

IN THE MATTER OF

S.M.A. HASAN,

COMPLAINANT,

v.

NUCLEAR POWER SERVICES, INC.,
STONE & WEBSTER ENGINEERING CORP.,
TEXAS UTILITIES ELECTRIC CO., INC.,

RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

## FINAL DECISION AND ORDER

The Administrative Law Judge (ALJ) in this case arising under the Employee Protection Provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), submitted a Recommended Decision and Order (R. D. and O.) recommending that the complaint be dismissed. The facts are well summarized in the R. D. and O. at 2-4.

Briefly, Complainant was employed from January 1982 to August 1985 by Respondent Nuclear Power Services, Inc. (NPSI), as a civil structural engineer working on pipe supports at the Comanche Peak nuclear power plant owned by Respondent Texas Utilities Electric Company (TUEC). When the pipe support engineering effort

was reorganized in the summer of 1985, one contractor, Respondent, Stone & Webster Engineering Corp., took over the work of several contractors, including NPSI. TUEC evaluated all the engineers in the pipe support area and made recommendations to Stone & Webster on which engineers to hire. TUEC recommended not hiring a number of engineers, including Complainant, and Stone & Webster did not hire him.[1] In January 1986, Complainant applied for work with Stone & Webster at Comanche Peak but he was not hired. R. D. and O. at 2. Complainant alleged that the negative recommendation by TUEC in August 1985 and the refusal of Stone & Webster to hire him in January 1986 were motivated by his numerous safety and quality complaints to management and his threats to complain to the Nuclear Regulatory Commission during his tenure at Comanche Peak.[2]

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[1] George Boerum, personnel manager for Stone & Webster, testified that Stone & Webster made employment offers to 79 of 110 engineers. T. 579-80.

[2] The ALJ dismissed the complaint against TUEC for terminating Complainant, and against Stone & Webster for refusing to hire him in August 1985, as untimely because Complainant did not file his complaint with the Department of Labor until February 18, 1986. ALJ Order Granting Partial Summary Judgment Dismissing Complaint, June 17, 1987. The hearing held by the ALJ was limited to whether TUEC and NPSI had blacklisted Complainant causing Stone & Webster not to hire him in January 1986. I agree with the ALJ's findings on timeliness. In addition, however, the findings of the ALJ discussed in the text, from which he concluded that the Respondents did not blacklist Complainant, apply as well to the questions of whether TUEC's negative recommendation

(Continued on following page)

The ALJ found that the failure of TUEC to recommend that Stone & Webster hire Complainant was based on his "chronic 'personality' problems with co-workers," R. D. and O. at 3, and was not based "even in part" on his safety complaints or threats to go to the NRC. *Id.* at 6. Many of Complainant's problems stemmed from religious differences between Complainant, a Moslem, and some of his co-workers who were Hindus. *Id.* at 3. In addition, the ALJ found that Complainant had an abrasive, overbearing and superior manner harmful to good working relationships with the other engineers and supervisors. *Id.*[3]

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(Continued from previous page)

and Stone & Webster's refusal to hire in August 1985 were motivated by an intent to retaliate against Complainant for protected activities. Indeed, the ALJ held that "there was neither blacklisting nor discrimination within the meaning of the Act." R. D. and O. at 6.

[3] The ALJ found that Complainant did not engage in protected activity because he did not pursue his technical concerns about construction of the Comanche Peak plant when he first made them, but only characterized them as safety concerns after Stone & Webster failed to hire him in August 1985. R. D. and O. at 5.

In addition, the ALJ found that Complainant's activities of making internal complaints and threatening to go to the NRC are not protected activities in the Fifth Circuit, where this case arises, under *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1036 (5th Cir. 1984). The Secretary has reiterated, in a number of cases, respectful disagreement with the holding in *Brown & Root*, and in cases arising within the Fifth Circuit has found internal complaints protected. *Bivens v. Louisiana Power & Light*, Case No. 89-ERA-30, Sec. Dec., June 4, 1991, slip op. at 4-5; *Lopez v. West Texas Utilities*, Case No. 86-ERA-25, Sec. Dec., July 26, 1988, slip op. at 5-6; *Willy v. The Coastal Corporation*, Case

(Continued on following page)

Finally, the ALJ held that Complainant's layoff by NPSI in October 1985 was not motivated by his internal complaints or threats to go to the NRC. *Id.* at 6.

## DISPUTED SETTLEMENT AGREEMENT

On January 27, 1989, Complainant filed a Motion to Enforce Settlement Agreement (Motion to Enforce), asserting that his attorney and an attorney for Respondent TUEC had entered into a settlement agreement. Complainant claimed that one of his former attorneys and an attorney for TUEC reached an oral agreement on June 27, 1988, and that the settlement was reduced to writing in a letter on June 28, 1988. Complainant S.M.A. Hasan's Statement of Facts and Law in Support of Motion to Enforce Settlement Agreement and for Attorneys's [sic] Fees (Statement in Support) at 17. Complainant also asserts that he accepted TUEC's settlement offer by a telegram of July 11, 1988, to Robert A. Wooldridge, a Dallas attorney representing TUEC. Statement in Support at 28-30. TUEC opposed the motion, asserting that no such settlement had been reached. The Secretary issued an Order to Show Cause (OSC) on March 21, 1991, directing the parties to show cause why the Secretary should not proceed to decide this case on the merits, and the parties have submitted responses to the OSC.

A careful review of the record shows that no settlement was entered into here. On June 28, 1988, TUEC

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No. 85-CAA-1, Sec. Dec., June 4, 1987, slip op. at 3. Because I agree with the ALJ on the merits of this case, *United States Postal Serv. Bd. of Governors v. Aiken*, 460 U.S. 711, 715-16 (1983), I do not address here the internal complaints issue.

attorney Wooldridge wrote to Billie Garde, an attorney with the Government Accountability Project (GAP)[4], purporting to "confirm . . . [an] agreement" of several outstanding disputes between TUEC and several individuals and an organization represented by GAP. Complainant's ERA complaint was one of the matters included in the settlement proposal. TUEC offered to pay four complainants represented by GAP $425,000, of which Complainant was to receive $200,000. However, the Wooldridge letter stated that there were several "conditions upon which the settlement . . . will become effective," including release of all claims against TUEC and the other Respondents, and

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[4] Some of the ambiguity over the existence of a settlement may have been caused by confusion over who represented Complainant and who represented TUEC at the critical time at issue. Complainant was represented at the 1987 hearing before the ALJ by Michael D. Kohn and Stephen M. Kohn, attorneys who were at that time associated with GAP; attorneys Harvey J. Wolkoff and Katrina Weinig of Boston represented TUEC at the hearing. Ms. Garde and Mr. Wooldridge held settlement negotiations in June 1988. On July 5, 1988, Complainant issued a notice that Billie Garde no longer represented him and that his sole legal representative was Michael D. Kohn, who by that time had formed his own private firm with Stephen M. Kohn. Michael Kohn and Stephen Kohn made certain representations on Complainant's behalf with respect to settlement of this case which are described in the text *infra*. Among other things, Michael Kohn wrote a letter to another attorney, Jack R. Newman, who represents TUEC in the licensing proceedings on the Comanche Peak plant. In addition, Louis Clark and Richard Condit, attorneys with GAP, contacted Complainant by mail and by telephone in early July 1988 regarding a settlement offer by TUEC. Mr. Clark was under the impression that GAP still represented Complainant.

the settlement and dismissal of a proceeding before an Atomic Safety and Licensing Board (ASLB) of the Nuclear Regulatory Commission brought by Citizens Association for Sound Energy (CASE). GAP represented CASE in the licensing proceeding.

Mr. Wooldridge's letter does not constitute a binding agreement. "[W]hen an offer or a counteroffer is accepted subject to a condition or reservation, neither party is bound to an agreement until the condition or reservation has been withdrawn or satisfied." *United States v. Newport News Shipbuilding & Drydock Co.*, 571 F.2d 1283, 1286 (4th Cir.) (quoting *Orient Mid-East Great Lake Service v. International Export Lines, Inc.*, 315 F.2d 519, 522 (4th Cir. 1963)), *cert. denied*, 439 U.S. 875 (1978). Indeed, in his 1989 Statement in Support, Complainant argued that two settlement terms proposed by Mr. Wooldridge, one in the letter, and one revealed by Ms. Garde on July 5, 1988, as having been part of the oral negotiations, were against public policy and illegal. Complainant urged the Secretary to strike these terms and enforce the remainder of the settlement. Complainant later vehemently rejected Mr. Wooldridge's settlement offer because of these terms, among others. *See infra*. The United States Court of Appeals for the Fifth Circuit recently described the Secretary's authority under the ERA as either to consent or not to consent to a settlement as written by the parties. The court there found no authority "to strike certain terms, and enforce the remainder, of a settlement without the consent of both [parties]." *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1154 (5th Cir. 1991).

On July 6, 1988, Michael Kohn wrote a letter on behalf of Complainant to Mr. Wolkoff, TUEC's hearing

counsel, in response to notice Mr. Kohn had received of a " *'conditional'* settlement extended to [Complainant] by . . . [TUEC]." (Emphasis added.) Mr. Kohn's letter indicated that $200,000 was not a sufficient settlement offer. In addition, Mr. Kohn said "pre-conditioning [a settlement] on acceptance by the ASLB of the 'Joint Stipulation' [dismissing the ASLB proceeding] is completely repugnant to [Complainant's] conscience." The letter further asserted that the settlement offer was tantamount to " 'hush' money" to purchase Complainant's silence on safety problems at Comanche Peak.

Also on July 6, Mr. Kohn wrote TUEC's licensing attorney Jack Newman, stating that the terms of the TUEC settlement offer were "unconscionable," and that "a general release by [Complainant] is worth twice [the $200,000 offer]." Mr. Kohn noted that the terms of a general release to be signed by Complainant had not been negotiated,[5] but that if the release included restrictions on Complainant's right to "intervene, oppose or interfere with the termination of the ASLB [licensing] proceeding . . . such terms are contrary to public policy and unenforceable." Mr. Kohn said that he was "willing to

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[5] Complainant contends that the "material terms of the Hasan settlement are *identical*" to two other cases settled and approved by the Secretary. Complainant's Response to OSC at 4-5. But both of those cases were submitted for review and approval with signed settlement agreements between the parties and signed releases from the respective complainants. *Radelich v. Ebasco Services, Inc.*, Case No. 88-ERA-24, Sec. Order, Aug. 3, 1989; *Goese v. Ebasco Services, Inc.*, Case No. 88-ERA-25, Sec. Order Dec. 8, 1988.

enter into settlement negotiations in an attempt to reach a compromise on various points," but that "absent a formal written settlement offer tendered to [Mr. Kohn], we must conclude that no good faith offer to settle [Complainant's] case is on the table."

Complainant thus emphatically rejected TUEC's settlement offer on July 6, 1988, and made a counter offer of some settlement terms which would be acceptable. *See, e.g., In re Pago Pago Aircrash of January 30, 1974*, 637 F.2d 704, 706 (9th Cir. 1981). No representative of TUEC accepted those terms or made a counter offer between July 6, and July 11, 1988, when Complainant sent the telegram to Mr. Wooldridge which Complainant now asserts was his acceptance of TUEC's settlement offer.

I do not find the July 11 telegram to constitute an unequivocal agreement to settlement terms that are clearly and completely set forth in other documents in the record in this case. *See* OSC at 2-3. The thrust of Complainant's telegram is that he does not know with whom to deal in attempting to settle his ERA complaint. He said he:

> demands whomever with authority to settle [this case] contact M. Kohn. No written or oral contact from TU[EC] ever received by [Complainant] or his legal rep[resentative]. Let the real agent of TU[EC] come forward and contact my sole legitimate representative, M. Kohn. . . . Tentative acceptance of $200,000 acceptable upon receipt of papers [Complainant] must sign.

This is not the "unequivocal declaration by the parties that they have agreed to all the terms of a settlement . . . stating those terms clearly" required before the Secretary can approve a settlement. OSC at 2.

Furthermore, the considerable confusion over who represented Complainant and who represented TUEC, make virtually impossible any determination whether an agreement was reached here and what the terms were. *See* note 4 *supra*. Several communications from GAP attorneys and responses by the Kohns contributed to the confusion. On July 8, 1988, Louis Clark, Executive Director of GAP, wrote to Complainant asking whether Complainant had terminated GAP as his legal representative and setting forth the terms of a settlement offer by TUEC which Mr. Clark, as Complainant's attorney, was transmitting to him. Apparently, Mr. Clark was not aware of Complainant's July 5 notice "To Whom It May Concern" that Michael Kohn was now his attorney. Nor is it clear whether the "offer" summarized in Mr. Clark's July 8 letter was the same as the offer in Mr. Wooldridge's letter of June 28 to Ms. Garde, or whether Mr. Clark was aware of the July 6 letters from Michael Kohn rejecting the June 28 offer. Mr. Clark's letter said Complainant must respond before close of business July 11 which may have given the Kohns the impression that TUEC's "offer" would be held open until that time.

In addition, Michael and Stephen Kohn apparently had the impression that Richard Condit, another attorney with GAP, was acting as TUEC's agent for purposes of settlement of Complainant's case. The Kohns wrote to Mr. Newman on July 10, 1988, stating that on that day they "informed your agent for purposes of settlement of the

Hasan matter, Mr. Richard Condit of . . . GAP," of Complainant's willingness to negotiate settlement of the case. The letter set forth some of the terms Complainant would require, including $500,000 to release his claims against all Respondents. The letter required submission to the Kohns of "the exact documents [Complainant] would be required to sign. . . . [and]" continued: "given [TUEC's] complete silence regarding numerous settlement letters sent by Michael Kohn to [TUEC's] counsel last week, we are forced to conclude that you have no intention of settling the Hasan matter . . . . "

Thus, the day before Complainant asserts he accepted TUEC's settlement offer, forming a binding contract which he urges me to approve, his attorney made a counteroffer involving substantially more money and bluntly stated that he believed TUEC had "no intention" of settling the case, and "[i]f we do not hear from your authorized agent before 12:00 midnight [July 10] we must conclude that the prior settlement offers transmitted by Mr. Louis Clark and Ms. Billie Garde of GAP were fraudulent and done with the intent to coerce and intimidate and possibly bribe [Complainant]." Letter of July 10, 1988, from Michael D. Kohn and Stephen M. Kohn to Jack R. Newman. Mr. Newman responded to the Kohns' July 10 letter on July 11 stating that "neither Mr. Condit not [GAP] is the agent of our firm for any purpose whatsoever . . . . "

Michael Kohn and Mr. Wooldridge have submitted affidavits stating the facts of their telephone conversations on July 11 and 12, 1988. Their affidavits conflict on the crucial point whether they agreed in one conversation on July 11 that a settlement had been reached. *Compare*

September 27, 1989, affidavit of Michael Kohn, ¶ 12, *with* May 4, 1989, affidavit of Robert Wooldridge, ¶ 4. In ¶ 13 of his affidavit, Michael Kohn states that after Mr. Wooldridge told Mr. Kohn an agreement had been reached, Mr. Kohn called Mr. Wooldridge back "to submit- . . . some lessor [sic] terms of the settlement [Complainant] wished to include in the text of a formal settlement document." The record does not contain this "formal settlement document", a draft of these additional terms, or any material specifying these terms, other than Mr. Kohn's affidavit, for the Secretary to review. Indeed, in ¶ 13 of the affidavit, Mr. Kohn acknowledges that Mr. Wooldridge told him he [Mr. Wooldridge] would have to speak to TUEC before adding these terms. *Cf. U.S. v. Newport News Shipbuilding*, 571 F.2d at 1286-87. These are material terms of the settlement which the Secretary must have an opportunity to review before approving the entire agreement. *See Macktal v. Secretary of Labor*, 923 F.2d at 1155-56 and n.25. For all of the above reasons, I conclude that no settlement was reached here.

## THE ALJ'S RECOMMENDED DECISION

The record in this case has been reviewed and I find that it fully supports the ALJ's factual findings set forth in his "Findings of Fact, General Findings," R.D. and O. at 2-4, and his conclusion that Respondents did not violate the ERA in their treatment of Complainant. Complainant has not proven that Respondent's reasons for their actions were pretextual or that the actions more likely were motivated by discrimination. *Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2, Sec. Dec., Apr.

25, 1983, slip op. at 7-8, and cases cited therein. Accordingly, the complaint in this case is DISMISSED.

In the Motion to Enforce, Complainant moved alternatively to vacate the ALJ's decision and remand for a new hearing claiming that an individual who would have testified about one aspect of this case was, at the time of the hearing, bound by a settlement agreement in another ERA case not to "induce any attorney, party, [or] administrative agency" to call that individual as a witness in other ERA cases. Motion to Enforce at 4, and brief of Complainant Joseph J. Macktal in *Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, at 14-17, referred to therein. Complainant asserts that Mr. Macktal would have testified that the SAFETEAM in-house safety organization at Comanche Peak could not be trusted to maintain the confidentiality of whistleblowers, which was the reason Complainant did not make complaints to SAFETEAM. Complaint [sic] moved, therefore, that the ALJ's findings about SAFETEAM, particularly his finding on Complainant's credibility in this regard, be reversed and a new hearing ordered.

This aspect of the Motion to Enforce is in the nature of a motion for a new trial under Rule 60(b) of the Federal Rules of Civil Procedure. The Fifth Circuit has held that "[a] motion for a new trial under Rule 60(b) is an extraordinary motion" which courts should be cautious in granting. *Washington v. Patlis*, 916 F.2d 1036, 1038 (1990). In addition, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, provide that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and

material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c) (1990).

As noted above, the record has been reviewed and found to support the ALJ's factual findings in his "Findings of Fact, General Findings." My decision is not based on the Respondent's proposed findings of fact which the ALJ adopted in his Specific Findings, R.D. and O. at 4. The only reference to SAFETEAM in the ALJ's General Findings is the fact, which Complainant does not dispute, that Complainant did not make any safety complaints to SAFETEAM. *Id.* at 3. I have not based my conclusion that Complainant did not carry his burden of proof on any derogation of Complainant's credibility as to why he did not raise his complaints with SAFETEAM. As I pointed out in note 3 above, the ALJ's finding on Complainant's failure to raise his complaints with SAFETEAM goes only to whether Complainant engaged in protected activity under the ERA.

Complainant has submitted no supporting affidavits, nor otherwise offered any showing that Mr. Macktal's alleged testimony "would produce a different result." *Washington v. Patlis,* 916 F.2d at 1039. Neither has Complainant shown that Mr. Macktal's testimony was the only way to have proven Complainant's truthfulness when he testified that "SAFETEAM was discredited and could not be trusted," nor that this alleged fact about SAFETEAM is "new and material evidence" which only became available after the closing of the record. 29 C.F.R. § 18.54(c). Finally, Complainant's suggestion that Respondent engaged in misconduct by entering into the settlement agreement with Mr. Macktal does not begin to meet

his burden under Rule 60(b)(3) to "establish by clear and convincing evidence (1) that the other party engaged in fraud or other misconduct and (2) that this misconduct prevented the moving party from fully and fairly presenting his case." *Washington v. Patlis*, 916 F.2d at 1039, quoting *Montgomery v. Hall*, 592 F.2d 278, 278-79 (5th Cir. 1979). The motion to vacate the ALJ's R. D. and O. and remand for a new hearing is DENIED.

The parties' respective requests for attorney's fees also are denied. Section 210 of the ERA provides that if the Secretary finds that a violation has occurred and issues a remedial order, "the Secretary . . . shall assess against the person against whom the order is issued . . . costs and expenses (including attorneys' fees . . . . " 42 U.S.C. § 5851(b)(2)(B). Complainant is not entitled to attorney's fees because no order has been issued against Respondent. ERA Section 210 does not provide for an award of attorney's fees against a Complainant, and Respondent has not cited any other source of authority for doing so. All other pending motions are DENIED.

SO ORDERED.

/s/ Lynn Martin
Secretary of Labor

Washington, D.C.

[SEAL]

**U.S. Department of Labor**
Office of Administrative Law Judges
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DATE: 21 OCT 1987
CASE NO. 86-ERA-24

IN THE MATTER OF

S. M. A. HASAN
COMPLAINANT

v.

NUCLEAR POWER SERVICES, INC.,
STONE & WEBSTER ENGINEERING CORP.,
TEXAS UTILITIES ELECTRIC CO., INC.
RESPONDENTS

Appearances

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BEFORE: ALFRED LINDEMEN,
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding under the Energy Reorganization Act of 1974 (the "Act"), 42 U.S.C. §5851, and the applicable regulations set forth at 29 C.F.R. Parts 18 and 24. After appropriate notice to interested parties, a hearing was held in Dallas, Texas, on June 22 and 23, 1987. Prior to the hearing, by Order Granting Partial Summary Judgment Dismissing Complaint, dated June 17, 1987, certain charges were dismissed as time-barred; specifically, allegations that respondents Texas Utilities Electric Co. and Nuclear Powers Systems, Inc. (hereinafter "Texas Utilities" and "NPSI" respectively) had violated the Act by terminating complainant in August and October of 1985 because of his having engaged in protected "whistleblower" activities. The remaining issue presented for adjudication is whether the same alleged activities caused complainant to be "blacklisted" when respondent Stone & Webster Engineering Corp. (hereinafter "Stone & Webster") failed to hire him in January/February 1986.[1]

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[1] In the absence of a determination that blacklisting occurred in January/February 1986, the charge that the Act was violated as a result of the alleged blacklisting of complainant when he was not hired by Stone & Webster in August 1985 would also be time-barred. *See Egenreider v. Metropolitan Edison Company/G.P.U.*, 85-ERA-23 (Opinion of the Secretary of Labor, dated April 20, 1987).

## Findings of Fact

### General Findings

Complainant was employed by NPSI as a civil structural engineer at Texas Utilities' Comanche Peak nuclear power plant between January 1982 and August 1985. Sometime before August of 1985, Texas Utilities determined to reorganize its pipe support group from one consisting of multiple contractors, of which NPSI was one, to a single, new contractor, Stone & Webster. Shortly before the time set for the reorganization, Texas Utilities' management personnel created a list of all the 110 engineers on the project with a recommendation indicating whether supervisors believed the individual was a candidate Stone & Webster should hire, consistent with the fact that the contract had a short completion deadline. The recommendation was reflected solely by a designation such as "yes," "hire," "no" or "maybe." Approximately 50 individuals were rated "yes" or "hire," 33 were rated "no," and 25 were rated "maybe." Complainant was rated as a "no." RX 68; TR 27-29, 35-38, 555-558.[2] In August 1985, after interviews with all the engineers who had been on the project, Stone & Webster decided to make job offers to about 79, of which complainant was not one. He was then released back to NPSI's New Jersey offices where he worked until laid off due to a reduction in force on or about October 17, 1985. Later, in January 1986 he attended a Stone & Webster hiring "open house," was interviewed again and advised in February 1986 that he was not to be hired.

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[2] "RX" and "CX" refer to Respondents' and Complainant's Exhibits, respectively; "TR" or "T" refers to the transcript of the hearing or deposition cited.

Complainant then filed a series of charges with the Equal Employment Opportunity Commission, alleging that he had been discriminated against because of his religion and his age. He filed the instant complaint, denominated an "Amended Complaint," on February 18, 1986, alleging that he had "suffered a series of reprisals on the job," that "he was continually harassed while attempting to comply with NRC rules and regulations and internal implementing procedures," and that he was "not hired by Stone & Webster" because of "their knowledge and/or belief of his engagement in protected activities."

As the main support for his complaint, complainant cited his frequent raising of "safety concerns" to management and his oft-repeated threat to "go to the NRC" unless his concerns were satisfied. He also claims he telephoned an employee of the NRC beginning in February of 1985 to convey these "safety concerns." Having considered the entire record in this case, including the relevant documents, the testimony of the witnesses who appeared before me, the videotaped testimony of the NRC employee and, in particular, claimant's demeanor at the hearing, I find that his version of events is simply not believable.

For example, the record is replete with evidence that both before and during his employment at Comanche Peak he had chronic "personality" problems with co-workers, mainly due to the fact that he is an Indian-born Moslem and he felt there was animosity between him and other engineers who are Hindus. As a consequence of such differences during the course of his 3½ years at

Comanche Peak, though he was considered a good engineer in terms of being a good "numbers cruncher," he was transferred at least twice. Another source of continuing disagreement between complainant, one supervisor, and his co-workers at Comanche Peak stemmed from the fact that his duties involved "checking" calculations of other engineers. There were multiple independent sets of design criteria, namely, those created by NPSI and those created by two other contractors. The fact that there was criticism of the use of different sets of criteria was well known, but it was the accepted practice at the time for each contractor's calculations to be checked according to that same contractor's set of criteria; complainant, however, would repeatedly "reject" calculations of other engineers because he checked them against another contractor's set of criteria. He also had a propensity for letting his co-workers know, in an abrasive manner, confirmed by his demeanor on cross-examination at the hearing, that he considered himself to be a superior engineer.

The record also discloses: 1) at no time prior to being informed he was not being hired by Stone & Webster in August 1985 did complainant ever see fit to convey his criticism about "inconsistent design criteria" or any other "concern" about safety to the on-site "Safeteam" unit, which was intended to receive any such concerns anonymously; 2) complainant did not communicate any of his concerns to an outside organization, "CASE," that was participating in an ongoing NRC proceeding involving the Comanche Peak project; 3) in numerous letters complainant directed to elected public officials from the President on down, as late as December 1985, he related his lack of employment to his being a member of an "utter

minority" and did not mention anything about safety concerns.

With respect to the "threats" complainant made "to go to the NRC," I find that although he did make such statements and they were known to some of his co-workers, there is absolutely no evidence that such comments caused him to be sanctioned, reprimanded, warned or in any way reigned in during the remainder of his tenure; indeed, the record indicates that he continued to receive raises even though his difficulty with co-workers continued unabated. Based on the totality of the record, therefore, I find that complainant's statements regarding the NRC had no effect at all on Texas Utilities' recommendation to Stone & Webster. As far as the contentions regarding the telephone calls to the NRC are concerned, Ahmed, the employee in question testified emphatically and convincingly that complainant called him well in advance of the August 1985 reorganization in an attempt to locate future employment and safety concerns were never mentioned. Considering the obvious self-interest of complainant and the evident lack of bias on the part of Ahmed, I specifically reject complainant's account of those communications.

In summary, I find that Texas Utilities recommended that Stone & Webster not hire complainant in August of 1985 solely because of his history of personality problems with co-workers, which was deemed not to be conducive to working on an assignment with a short-term completion deadline. I also find no evidence that NPSI or Stone & Webster knew any specifics of complainant's past work record, his practice of rejecting co-workers' calculations or his statements regarding the NRC; nor is there any

credible evidence that Stone & Webster treated complainant disparately from some 31 other engineers who were not offered jobs in August of 1985. As far as the record regarding the interview and re-evaluation of complainant in January 1986 is concerned, I am persuaded by the convincing testimony that the decision not to hire was made solely on the ground that "back in August we had made a decision not to hire Mr. Hasan, and I couldn't see any reason why in January or February we would change our mind to hire him" TR 568; also, that complainant was again treated in the same manner as another engineer who was also re-interviewed but not hired on the basis of the prior rejection.

## Specific Findings

Having fully reviewed the proposed findings of fact filed by the parties, I find that with only a minor modification, respondents' are consistent with my analysis of the documentary record and my observations of the testimony and demeanor of the witnesses. I therefore adopt and incorporate herein by reference Respondents' Proposed Findings of Fact Nos. 1 through 128, dated August 6, 1987, including the record citations in support thereof, with the modification that in Finding No. 66 the reference to Mrs. Hasan having been present in the courtroom on the first day of the hearing is stricken.

## Conclusions of Law

Section 210 of the Act prohibits the discharge of, or other discrimination against, an employee because he or she engaged in or was about to engage in some activity

protected by the Act. 42 U.S.C. §5851. Thus, the record is this case must establish: first, that complainant had engaged in some protected activity within the meaning of the Act before Stone & Webster determined not to hire him; second, that the decision not to hire him was at least in part due to that activity.

No protected activity

It is essentially complainant's position that a prima facie case of protected activity is established by the evidence of his disputes with co-workers and one supervisor, which were manifestations of "safety concerns," coupled with the evidence that he either communicated those concerns to the NRC or at least expressed threats to do so. I must disagree for several reasons.

First, it must be observed that notwithstanding the obvious beneficent purposes of the Act and the concomitant need to weigh factual records liberally with a view toward furthering those purposes, I know of no authority that would allow a problem employee to insulate himself from unemployment by the mere making of comments about his work and threats to go to the NRC. In other words, given the self-evident fact that virtually anything an engineer on a nuclear power project says about his work can be construed to "relate to safety," an employee, such as complainant in this case, could guarantee his future continued employment by periodically repeating the phrase "I have a safety concern and I may go to the NRC." As the Fifth Circuit stated in a slightly different context, "section 210 does not sanction this type of abuse, and an employer need not tolerate it." *Dunham v. Brock,*

794 F.2d 1037 (5th Cir. 1986). Thus, where, as in this case, it is found that complainant himself never pursued those matters about which he had any "concerns" at the time they arose and that he did not begin to characterize those matters as safety complaints until long after his non-hiring by Stone & Webster in August 1985, I conclude that such comments as he made about his work during his tenure from 1982 through August 1985 were not protected activities within the meaning of the Act.

Moreover, even assuming for the sake of argument that complainant's comments and threats were intended by him and understood by his employer as being safety related, since this case arises in the Fifth Circuit they can be considered protected activities only if communicated to the NRC. As indicated above, however, it is found that complainant's comments and threats *were not* communicated to the NRC until long after both Texas Utilities' recommendation that he not be hired and Stone & Webster's decision not to hire him. It is also clear that he was not a quality control inspector. Accordingly, I conclude that the activity cannot be deemed protected. *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984); *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159, 1163 (9th Cir. 1984).[3]

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[3] The Secretary of Labor's recent "non-acquiescence" of *Brown & Root* in *Willy v The Coastal Corporation and Coastal States Management Corp.*, Case No. 85-CAA-1 (June 4, 1987), is noted. *See*, however, *Hyatt v. Heckler*, 807 F.2d 376 (4th Cir. 1986), and cases cited at n. 4, p. 379.

No discrimination

As indicated above, it is found that neither Texas Utilities' non-hiring recommendation regarding complainant nor Stone & Webster's decision not to hire him was based even in part on his prior comments or threats; that instead the recommendation by Texas Utilities was made solely on the basis of his history of not getting along with co-workers and the decision by Stone & Webster was made solely on the basis of that recommendation, their own interviews, and without knowledge of the specific reason for the recommendation. It has also been found that complainant's lay-off by NPSI in October of 1985 was unrelated to any of his comments or threats, and was instead a purely business determination, namely, lack of work in the industry. Under these circumstances, it is concluded there was neither blacklisting nor discrimination within the meaning of the Act. *See Mackowiak v. University Nuclear Systems, supra; Dunham v. Brock, supra; DeFord v. Secretary of Labor,* 700 F.2d 281 (6th Cir. 1983).

Attorney's fees and costs

Both sides have asserted that their respective attorney's fees and costs be paid by the other. Since complainant has not prevailed, there is clearly no basis for his fees or costs being paid by respondents. Though I do believe complainant's counsel has pursued this action much further than warranted by the demonstrably weak facts of the case, I cannot say there has been such an abuse of the system as would require assessing respondents' fees and costs against complainant.

## ORDER

It is therefore ordered that the complaint of S. M. A. Hasan be dismissed against all respondents.

/s/ Alfred Lindeman
ALFRED LINDEMAN
Administrative Law Judge

San Francisco, California

MOTION FILED
SEP 1992

No. 92-233

# In the Supreme Court of the United States

OCTOBER TERM, 1992

S.M.A. HASAN,
PETITIONER,

*v.*

LYNN MARTIN, SECRETARY OF LABOR,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION AND BRIEF AMICUS CURIAE IN OPPOSITION

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Dated: September 4, 1992

BATEMAN & SEADE, INC. BOSTON

## QUESTION PRESENTED

Should this Court review a case based on an issue that was not reached by the court below?

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THE UNITED STATES COURT OF APPEALS
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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION

Nuclear Power Services, Inc. ("NPSI"), Stone & Webster Engineering Corp. ("Stone & Webster"), and Texas Utilities Electric Company ("TUEC") (together, the "Amici") hereby respectfully move for leave to file the attached brief amicus curiae in opposition to a grant of certiorari in the above-captioned case. The consent of the attorney for the respondent has been obtained. The consent of the petitioner was requested but refused.

The interest of the Amici in this action is that they were the party respondents in the Complaint brought by the Petitioner under the Employee Protection Provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1988).

In this case, Mr. Hasan alleged that he was blacklisted by TUEC and Stone & Webster for "whistleblowing" while working as an employee of NPSI at TUEC's Comanche Peak plant. A. 18-19.[1] Mr. Hasan was released from Comanche Peak back to his employer NPSI in August, 1985, when TUEC replaced three pipe support engineering contractors, of which NPSI was one, with a single new contractor, Stone & Webster. A. 19.[2] TUEC did not recommend that Stone & Webster hire Mr. Hasan. *Id.* Stone & Webster declined to hire Mr. Hasan in August 1985 when it took over operations at Comanche Peak, and, seeing no reason to reconsider its earlier decision, Stone & Webster also declined to hire Mr. Hasan when he again applied for employment in early 1986. *Id.* Mr. Hasan subsequently brought this action alleging that he had made safety complaints while at Comanche Peak that were the basis for TUEC's negative recommendation and Stone & Webster's subsequent decisions not to hire him. A. 20.

The Amici defended the case at trial before the Administrative Law Judge (the "ALJ"), who after hearing the case submitted a Recommended Decision and Order recommending that the case be dismissed. The Amici then argued for the Secretary of Labor's acceptance of that recommendation, which the Amici obtained on June 26, 1991 when the Secretary issued a Final Decision and Order dismissing the Complaint. The Amici also appeared as amicus curiae in the support of affirming the Secretary of Labor's decision in the Fifth Circuit. As the real parties in interest in this case, the Amici have a substantial interest in protecting the Fifth Circuit's decision affirming the Secretary of Labor's Final Decision and Order. Indeed, it is only because of the unusual procedure applicable to the

[1] This motion cites to the appendix attached to Mr. Hasan's petition as A.

[2] Mr. Hasan subsequently was laid off by NPSI because it was unable to find work for him elsewhere. A. 19.

the review of federal agency decisions that the Secretary of Labor was named as the only responding party to this case on appeal rather than the Amici, making it appropriate and helpful for this Court to consider the arguments of the Amici.[1]

Furthermore, the Amici can offer valuable assistance to this Court. As the real parties in interest in this case and the parties who defended it at trial, the Amici are capable of offering this Court the most complete picture of the facts which formed the basis of the decision below. A thorough understanding of the facts proved below will assist this Court in seeing that its review of this case is inappropriate, because the case below was decided based on the factual finding that no discrimination had occurred since safety complaints were not a motivating factor in the employers' decisions. Indeed, the ALJ found that the failure to recommend or hire Mr. Hasan was based entirely on his "chronic 'personality' problems with coworkers." A. 20, 22. Based on these facts, the Secretary of Labor expressly concluded that it was not necessary even to reach the issue with respect to which Petitioner seeks this Court's review of whether internal complaints are protected. A. 5-6 at n.3.

[1] The Fifth Circuit denied the Amici leave to intervene on the ground that their motion was untimely, but permitted the Amici to brief and argue the case as amicus curiae.

## CONCLUSION

For the above-stated reasons, the Amici respectfully request that this Court grant their motion for leave to file the attached proposed brief amicus curiae in opposition to certiorari.

Respectfully submitted,

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Dated: September 4, 1992

**No. 92-233**

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## BRIEF AMICUS CURIAE IN OPPOSITION

## STATEMENT OF THE CASE

This case is based on the claims of Petitioner S.M.A. Hasan under Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. Mr. Hasan alleged that Texas Utilities Electric Company ("TUEC") and Stone & Webster Engineering Corporation ("Stone & Webster") blacklisted him because of the purported "whistleblower" activities that he allegedly engaged in at TUEC's Comanche Peak plant, while working as an employee of Nuclear Power Services, Inc. ("NPSI"), a TUEC contractor. He alleged that, as a result, Stone & Webster did not hire him in 1986, after he had been released from the plant and discharged by NPSI in the fall of 1985 because of general

lack of work in the nuclear industry.[4] The Administrative Law Judge (the "ALJ") concluded that the decision not to hire Mr. Hasan was based solely on his history of not getting along with co-workers, and the Secretary of Labor adopted that finding. After argument, the Secretary of Labor's decision was summarily affirmed by the Fifth Circuit Court of Appeals. Mr. Hasan now petitions this Court to review this case on the basis of an issue that the Secretary of Labor and the Fifth Circuit did not even deem necessary to reach, and did not reach, in deciding the case. Amici[5] respectfully submit that Mr. Hasan's petition should be denied.

## 1. Background.

The events leading to this action began with Mr. Hasan's release back to his then employer NPSI in August 1985. At that time, TUEC replaced all three of its pipe support engineering contractors (of which NPSI was one) with a single new contractor, Stone & Webster. A. 19.[6] In deciding which engineers to hire for continued work at Comanche Peak, Stone & Webster interviewed the engineers and considered a list of "yes, no, or maybe" recommendations from TUEC. *Id.* Mr. Hasan was one of approximately thirty engineers who were not recommended by TUEC and whom Stone & Webster decided not to hire for continued work at the plant. *Id.*

Subsequently, in October 1985, Mr. Hasan was laid off by his employer NPSI, along with a number of other engineers,

[4] Mr. Hasan did not challenge before the Secretary of Labor the ALJ's dismissal of claims based on his original release from the Comanche Peak plant and discharge from NPSI.

[5] TUEC, Stone & Webster, and NPSI are together referred to herein as the "Amici."

[6] This response cites to the appendix attached to Hasan's petition as A. It cites to the appendix in the Fifth Circuit, which contained two volumes, as AA.I or AA.II, as appropriate.

because NPSI was unable to find work for him, due to a sharp decline in nuclear plant construction. A. 19; AAI. 229-30. In February 1986, Mr. Hasan again applied to Stone & Webster to work at Comanche Peak, but was rejected on the ground that there was no reason to change the previous decision not to hire him. AAI. 270-72. After filing a series of complaints and sending a series of letters unsuccessfully alleging that he was the victim of religious and age discrimination, A. 20; AAI. 164-72, Mr. Hasan filed this case in February 1986, alleging that he was released in retaliation for whistleblowing activities at Comanche Peak.

The record clearly supports the decision below that Mr. Hasan was released based on difficulty getting along with coworkers rather than because of any purported whistleblowing activities. Prior to his release, Mr. Hasan had a long history of great difficulty interacting with his fellow engineers, dating back a number of years. Mr. Hasan himself admitted at trial his personality problems, which he attributed to perceived religious differences with Hindu co-workers, because he is a Moslem. AAI. 174-75, 183-84, 201-02; A. 20. Evidence of such problems appeared even before he came to Comanche Peak; one supervisor at the South Texas nuclear power project where he worked before coming to Comanche Peak observed that: "[Mr. Hasan] suffers from paranoia of being discriminated [against], and everybody being out to get him. This prevents him from establishing a harmonious rapport with colleagues." AAI. 161-62.

While at Comanche Peak, Mr. Hasan demonstrated substantial difficulties in working with his fellow engineers. He had confrontations with supervisors, as well as almost all of his fellow engineers, including frequent outbursts and fits of temper and a knife incident. AAI. 81-82, 194. Furthermore, he alienated his colleagues by openly stating that, while he considered himself an "excellent" engineer, his colleagues were all incompetent. AAI. 184-91; A. 21. He also complained

about petty matters, such as the claim that his office area was supposedly four inches smaller than that of his co-workers. AAI. 199. Despite these problems, TUEC made repeated efforts to find Mr. Hasan a location where he could work effectively with his fellow engineers, transferring him to three different groups of engineers during his three years at the plant. AAI. 59, 68. When confronted with the obligation of deciding which engineers to recommend to Stone & Webster, however, TUEC legitimately declined to recommend Mr. Hasan because of his long history of personality conflicts. A. 22.

**2. The Decisions Below.**

After hearing the evidence, the ALJ concluded that no blacklisting or discrimination had occurred, and dismissed Mr. Hasan's complaint. A. 26-27. The ALJ's holding was based on two findings. His principal finding, and that relied on by the Secretary of Labor in affirming the ALJ's opinion, was that TUEC's recommendation and Stone & Webster's decision not to hire him were based solely on his history of problems getting along with co-workers, and not even in part on any prior whistleblowing comments or threats. A. 22-23, 26. The ALJ also addressed the protected activity issue, finding that Mr. Hasan had not engaged in any protected activity while at Comanche Peak and noting that Mr. Hasan himself had not characterized his concerns as safety complaints until long after Stone & Webster declined to hire him in August 1985. A. 25.[7] The ALJ only briefly addressed the issue of whether internal complaints constitute protected activity without making it the basis for his holding, stating that "even assuming for the sake of argument that complainant's comments and threats were intended by him and understood by his employer as being safety

[7] On this point, the ALJ made credibility findings adverse to Mr. Hasan. A. 20, 22.

related" such internal threats would not constitute protected activity under the Fifth Circuit's ruling in *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029 (5th Cir. 1984). A. 25.

In affirming the ALJ's decision, the Secretary of Labor explicitly decided that reaching the issue of whether internal complaints constitute protected activity was unnecessary. A. 5-6 at n.3. The Secretary found that the record fully supported the ALJ's finding that the Amici's actions were not motivated by discrimination, but rather solely by Mr. Hasan's personality problems. The Secretary held that dismissing Mr. Hasan's complaint was thus appropriate, whether internal complaints consitute protected activity or not. A. 5-6 at n.3; 13-14. The Fifth Circuit summarily affirmed the Secretary of Labor's decision, finding no basis for rejecting the Secretary's decision that affirmed the ALJ's decision. A. 1-2.

## REASONS FOR DENYING THE PETITION

Petitioner Hasan asks that this Court grant certiorari on the ground that this case purportedly raises a split in the circuit courts of appeal, concerning whether purely internal complaints to management constitute protected activity under the Energy Reorganization Act. In fact, however, this case does not raise the issue of the split among the Circuits on the internal complaint question, because the Fifth Circuit did not render a decision here based on the issue of what constitutes protected activity. Rather, the Fifth Circuit summarily affirmed the decision of the Secretary of Labor, which held that the issue of whether internal complaints constitute protected activity need not even be addressed in this case because the substantial evidence clearly supported the ALJ's conclusion that Mr. Hasan was not recommended for hire by TUEC and not hired by

Stone & Webster "solely on the basis of his history of not getting along with co-workers." A. 5-6 at n.3; 13-14; 26.*

Because the issue of whether internal complaints constitute protected activity was not reached (and was not required to be reached) in the decision below, a grant of certiorari is inappropriate. *Upjohn Co.* v. *United States*, 449 U.S. 383, 394 n.3 (1981) (refusing to decide an issue not passed upon by the court of appeals); *Combs* v. *United States*, 408 U.S. 224, 227 n.4 (1972) (same); *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971) (same); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328 (1945) (dismissing writ of certiorari, in part, because question presented was not passed upon below); *United States* v. *Rimer*, 220 U.S. 547, 548 (1911) (dismissing writ of certiorari when closer scrutiny of the record revealed that the court below had not dealt with the issue that warranted review by certiorari).

Here, although Fifth Circuit precedent may differ from other courts of appeal addressing the internal complaints issue, the Fifth Circuit has not in this case "rendered a decision in conflict with the decision of another United States court of appeals." Supreme Court Rule 10.1.

Thus, review of the issue of whether internal complaints are protected in this case would require addressing the issue in the abstract, rather than for purposes of correcting any error in the outcome of the case below. Accordingly, resolution of

*This finding that substantial evidence supports dismissal of Mr. Hasan's complaint without reaching the internal complaint issue, which in fact was the basis of the decision below, is not raised as an issue for review in Mr. Hasan's petition, nor would it be an appropriate question for this Court's review. *Universal Camera Corp.* v. *Nat'l Labor Relations Bd.*, 340 U.S. 474, 490-91 (1951) (whether on the record there is substantial evidence to support a finding is a question for the court of appeals; the Supreme Court will intervene only in the "rare instance when the standard appears to have been misapprehended or grossly misapplied"); *Nat'l Labor Relations Bd.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-03 (1951) (same).

the internal complaints issue is better saved for a case that, in the decision below, has called for the Fifth Circuit to reach the issue and to consider it in light of the law that has developed since its 1984 decision in *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029 (5th Cir. 1984).

## CONCLUSION

For the above stated reasons, Amici respectfully request that this Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

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Dated: September 4, 1992

(3)

No. 92-233

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

S.M.A. HASAN, PETITIONER

*v.*

LYNN MARTIN, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner's inability to obtain a nuclear engineering job was a result of prohibited discrimination under Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851.

## PARTIES TO THE PROCEEDING

In addition to the captioned parties, Nuclear Power Services, Inc., Stone & Webster, and Texas Utilities Electric Co. were respondents in proceedings before the Secretary of Labor. They participated as amicus curiae in the court of appeals.

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not reported, but the judgment is noted at 963 F.2d 369 (Table). The final decision and order of the Secretary of Labor (Pet. App. A3-A16) and the recommended decision and order of the administrative law judge (Pet. App. A17-A27) are not officially reported.

### JURISDICTION

The judgment was entered on May 7, 1992. The petition for a writ of certiorari was filed on August 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is an engineer formerly employed by Nuclear Power Services, Inc. (NPSI), a contractor at the Comanche Peak nuclear power plant operated by Texas Utilities Electric Company (TUEC). Pet. App. A3, A19. Both before and during his three-and-a-half-year tenure at Comanche Peak, petitioner, who is a Moslem, had chronic personality problems with his co-workers, attributable largely to a perceived animosity between himself and his Hindu co-workers. *Id.* at A20. Additionally, petitioner often indicated to his co-workers, in an abrasive manner, that he considered himself a superior engineer. *Id.* at A21. Although petitioner was considered a good "numbers cruncher," he had continuing disagreements with other engineers when he was required to check their calculations. Petitioner was transferred at least twice during his Comanche Peak employment. *Ibid.*

During the summer of 1985, TUEC decided to replace NPSI and two other contractors, who had been using independent sets of design criteria, with a single contractor, Stone & Webster. Pet. App. A3-A4, A19. In August 1985, TUEC management recommended that Stone & Webster hire some of the engineers who worked for the earlier contractors, "consistent with the fact that the [Stone & Webster] contract had a short completion deadline," *id.* at A19, but also recommended that Stone & Webster not hire 33 former employees, including petitioner. After interviewing petitioner, Stone & Webster decided not to hire him. *Id.* at A4, A19. Stone and Webster made job offers to 79 out of 110 engineers formerly employed on the project. *Id.* at A19. In January or February 1986, petitioner reapplied for work with Stone & Webster, but was not hired based on the company's earlier no-hire decision. *Id.* at A19, A23.

2. In February 1986, petitioner complained to the Department of Labor that his failure to obtain a job in August 1985 and February 1986 resulted from the fact that he had engaged in activities protected under Section 210(a) of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5851(a).[1] Among other things, petitioner alleged that he had raised safety concerns to TUEC management, threatened to take his concerns to the Nuclear Regulatory Commission (NRC), and actually telephoned his safety concerns to an NRC employee. Pet. App. A20. The ALJ dismissed petitioner's August 1985 charge as untimely, *id.* at A25, and rejected his remaining argument that his alleged activities caused him to be blacklisted by Stone & Webster in February 1986. *Id.* at A17-A27.

In rejecting petitioner's claim of blacklisting, the ALJ stated that petitioner had not engaged in protected activity under Section 210. Contrary to petitioner's testimony, the ALJ found that his telephone call with an NRC employee was an attempt to find a job and had nothing to do with safety. Pet. App. A22. Petitioner's disputes with co-workers were not manifestations of safety concerns, the ALJ explained, because petitioner did not pursue the

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[1] Section 210(a) prohibits discrimination against an employee who has "(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended; (2) testified or is about to testify in any such proceeding or; (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.]."

matters about which he had concerns when they arose and did not characterize them as safety complaints until long after Stone & Webster's August 1985 decision not to hire him. *Id.* at A24-A25. Similarly, the ALJ concluded that while petitioner did threaten to go to the NRC, *id.* at A22, that threat was not pursued and was therefore not protected. *Id.* at A25. The ALJ read *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029 (5th Cir. 1984), to require that petitioner's concerns and threats be communicated to the NRC in order to be protected.[2] Pet. App. A25.

The ALJ also concluded, however, that neither TUEC's recommendation nor Stone & Webster's decision not to hire petitioner "was based even in part on his prior comments or threats." Pet. App. A26. The ALJ stated that TUEC recommended that Stone & Webster not hire petitioner "solely because of his history of personality problems with co-workers, which was deemed not to be conducive to working on an assignment with a short-term completion deadline." *Id.* at A22. Moreover, the ALJ found no evidence that Stone & Webster knew any specifics about petitioner's work history, or that in either August 1985 or February 1986 it treated him differently from the many other engineers who were not offered jobs. *Id.* at A22-A23. Thus, having found "neither blacklisting nor discrimination," the ALJ recommended that the complaint be dismissed. *Id.* at A26-A27.

3. The Secretary of Labor dismissed the complaint. Pet. App. A3-A16. Noting her disagreement with *Brown & Root*, the Secretary nevertheless found it unnecessary to decide whether petitioner's

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[2] *Brown & Root* was controlling here as this case arose in the Fifth Circuit.

internal complaints and threats to go to the NRC were protected activities. *Id.* at A5-A6 n.3. Instead, the Secretary agreed with the ALJ that TUEC's no-hire recommendation was based on petitioner's "chronic 'personality' problems with co-workers," and not based "'even in part' on his safety complaints or threats to go to the NRC." *Id.* at A5. Because petitioner failed to prove discrimination, his complaint was dismissed. *Id.* at A13-A14.[3]

4. The court of appeals summarily affirmed, stating that it found "no basis for rejecting the decision by the Secretary." Pet. App. A1-A2.

## ARGUMENT

Petitioner contends (Pet. 6-9) that review is warranted to resolve a conflict in the circuits over whether safety concerns must be communicated to the government to warrant protection under Section 210 of the ERA, 42 U.S.C. 5851. While we agree that the circuits are in conflict, this case does not present the issue on which the circuits disagree. Because the court of appeals' affirmance of the Secretary's factbound decision is correct and does not conflict with any decision of this Court or any other court of appeals, further review is not warranted.

1. The court of appeals correctly affirmed the Secretary's decision because substantial evidence supports the Secretary's conclusion that TUEC, NPSI, and Stone & Webster did not discriminate against

[3] The Secretary affirmed the ALJ's dismissal of petitioner's August 1985 discrimination complaint as untimely, Pet. App. A4 n.2, and also rejected petitioner's requests to enforce a purported settlement and to remand for a new hearing. *Id.* at A6-A13, A14-A16. Petitioner does not seek review of the Secretary's decision on these matters.

petitioner. See 42 U.S.C. 5851(c)(1); *Dunham* v. *Brock*, 794 F.2d 1037, 1039-1040 (5th Cir. 1986).

TUEC recommended that Stone & Webster not hire petitioner in August 1985 because he had a history of problems with co-workers and would likely be a disruption on the Stone & Webster job, which had a short completion deadline. Stone & Webster, which did not know any specifics of petitioner's work history, interviewed him after receiving the negative recommendation and, in deciding not to hire him both in August 1985 and early 1986, treated him no differently from the other former employees it decided not to hire. In those circumstances, the Secretary did not consider, and was not required to consider, whether petitioner proved that he engaged in protected activities as necessary to make out a prima facie case of discrimination. See *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 713-714 (1983); *Dunham*, 794 F.2d at 1039-1040 n.2.

Petitioner does not dispute that he had chronic personality problems with his co-workers. Instead, he states (Pet. 4) that those problems resulted from his frequently expressed safety-related design concerns at Comanche Peak and that these concerns led TUEC to recommend that Stone & Webster not hire him. That disagreement with administrative fact findings concurred in by the ALJ, the Secretary of Labor, and the court of appeals raises a factbound question that does not warrant this Court's review. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

In any event, petitioner's claim lacks merit. There is substantial evidence that the no-hire recommendation "was not based 'even in part' on his safety complaints or threats to go to the NRC." Pet. App.

A5 (quoting *id.* at A26).[4] Petitioner's problems with co-workers began even before his employment at Comanche Peak and were based mainly on animosity he perceived between himself and other engineers and his abrasive attitude toward his co-workers. *Id.* at A20-A21. There was "absolutely no evidence" that his threats and comments about going to the NRC "caused him to be sanctioned, reprimanded, warned or in any way [reined] in during the remainder of his tenure [at Comanche Peak]; indeed * * * he continued to receive raises even though his difficulty with co-workers continued unabated." *Id.* at A22.

2. Because petitioner failed to prove that his threats and internal activities led to the no-hire decisions, this case does not present the issue that has led to a conflict in the courts of appeals: whether Section 210 of the ERA protects purely internal activity. Compare *Kansas Gas & Elec. Co.* v. *Brock*, 780 F.2d 1505, 1510-1512 (10th Cir. 1985) (internal complaints are protected), cert. denied, 478 U.S. 1011 (1986); *Mackowiak* v. *University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (same), with *Brown & Root*, 747 F.2d at 1036 (purely internal complaints are not protected).[5] The court of appeals' summary

[4] Petitioner mistakenly argues (Pet. 6) that the Secretary did not consider whether his personality problems were caused by his mention of safety concerns. By agreeing with the ALJ that TUEC's no-hire recommendation was based on these problems and not even in part on any safety complaints, the Secretary determined that the problems were not related to safety complaints.

[5] See also *Jones* v. *TVA*, 948 F.2d 258, 264 (6th Cir. 1991) (employee who files internal complaint "has recourse" under ERA); *Couty* v. *Dole*, 886 F.2d 147 (8th Cir. 1989) (employee who threatened to go to NRC and raised safety concerns to his supervisors established a prima facie case of discrimination); *Consolidated Edison Co.* v. *Donovan*, 673 F.2d 61 (2d Cir. 1982)

affirmance of a decision in which the Secretary had noted disagreement with *Brown & Root* cannot fairly be read to pose the conflict that petitioner asserts. Petitioner lost in the court of appeals because he was entitled to no relief, whether or not his asserted internal activities were protected.

Moreover, it is not clear that the courts of appeals that have found protection for internal activities would find that petitioner's activities were protected. The Ninth Circuit, for example, has recognized the possibility that an employer may legitimately discharge an employee whose protest activities interfere with his job performance, see *Mackowiak*, 735 F.2d at 1164-1165, and acknowledged that certain actions taken without authority may not be protected. See *Lockert* v. *United States Dep't of Labor*, 867 F.2d 513, 518 (9th Cir. 1989) (agreeing with Secretary that an employee cannot leave his work station to pursue safety concerns without permission of his supervisor); *Mackowiak*, 735 F.2d at 1161, 1164 (employee's "red tagging" of a tool crib without authority probably is not protected). It may well be that petitioner raised his alleged safety concerns and threats in a manner that interfered with his ability to work on a project requiring close cooperation among co-workers and a short deadline for completion. Some of his activities, such as "repeatedly 'reject[ing]'" other engineers' calculations based on his use of a different set of criteria, Pet. App. A21, might also not be protected under any circuit's construction of Section 210.

Finally, we believe, as we stated in opposing review in *Kansas Gas & Elec. Co.* v. *Brock*, *supra*, that the

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(finding discrimination based on internal activities without discussing issue).

Fifth Circuit was not fully presented with the arguments for finding at least some internal activities to be protected under Section 210(a). Accordingly, the Secretary intends to ask the Fifth Circuit to overrule *Brown & Root* in a pending appeal in that circuit, *Ebasco Constructors, Inc.* v. *Martin*, No. 92-4576, in order to achieve uniform protection for whistleblowers.[6]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The issue of coverage of internal complaints also is pending in the Third Circuit in *Passaic Valley Sewerage Commissioners* v. *Martin*, No. 92-3261.

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No. 92-233

In The

# Supreme Court of the United States

October Term, 1992

S.M.A. HASAN,

*Petitioner,*

v.

LYNN MARTIN, SECRETARY OF LABOR,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

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## CERTIORARI IS WARRANTED TO DETERMINE WHETHER PETITIONER, MR. HASAN, ENGAGED IN INTERNAL PROTECTED ACTIVITY

Respondent, asserts that certiorari should be denied because mere "disagreement with administrative fact findings" does not "warrant this Court's review." Brief for the Respondent in Opposition ("Respondent's Brief") at p. 6. In support of this assertion respondent argues that "petitioner's claim lacks merit" because there is "substantial evidence" on the record to support the conclusion that Mr. Hasan's blacklisting " 'was not based, even in part, on his safety complaints. . . . ' " *Id.*, at p. 6 (quoting to the Recommended Decision and Order ("R.D. and O.") of the Administrative Law Judge ("ALJ"), Pet. App. at p. A26).

This argument is misplaced for two reasons. First, the argument rests on a finding of the ALJ which was specifically not adopted or approved by the Secretary of Labor ("SOL"). The SOL was specific in what part of the R.D. and O. she had adopted, and specifically limited herself to the ALJ's " 'Findings of Fact, General Findings' R.D. and O. at 2-4 [Pet. App. pp. A19-A23], and his conclusion that Respondents [Texas Utilities Electric Co., and Stone & Webster Engineering Corp.] did not violate the E[nergy] R[eorganization] A[ct] in their treatment of [Mr. Hasan]." Final Decision and Order of SOL. Pet. App. at p. A13. Yet, the sole record support respondent relies upon to claim that she had properly reached the determination that Mr. Hasan had not been discriminated against is the very portion of the ALJ's R.D. and O. which was *not* adopted by the SOL. *See* Pet. App. at p. A26.

Respondent's argument must fail because under Section 210 of the ERA, *only* the SOL is permitted to make final factual (or legal) determinations. A decision of an ALJ is merely a "recomended decision" and the SOL has the sole authority to issue a "final order" based upon the record. *Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes,* 29 C.F.R. § 24.6(a) & (b). The SOL did not adopt the ALJ's finding of fact that TUEC's decision to recommend that its contractors not hire Mr. Hasan was not based, "in part," on Mr. Hasan's protected activity and, as such, she cannot rely on this assertion now. But, should this Court find Mr. Hasan's internal safety-related complaints protected under the law, this case should then be remanded back to the SOL so the SOL can render an independent and final decision on this critical finding of the ALJ.

Second, the SOL did not overturn the ALJ's holding that the *Brown & Root* doctrine prohibited Mr. Hasan from recovery,[1] but rather argued before the Fifth Circuit that the *Brown & Root* doctrine required the panel to affirm the decision of the SOL. Brief for the Secretary of Labor at p. 35 ("Any panel of this Court is bound by *Brown & Root,* however, so under no circumstances could Hasan prevail here based on the purely internal complaints he alleges."). The SOL further argued to the panel that "if this Court finds it necessary to decide whether Hasan

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[1] The ALJ concluded that "since this case arises in the Fifth Circuit" Mr. Hasan's internal "comments and threats" could not be considered "protected activities" because they "*were not* communicated to the NRC." A25 (emphasis in the original).

engaged in protected activity, it should remand that question to the Secretary, for the appropriate factual determinations." *Id.*, at p. 37.

Exactly why the Fifth Circuit upheld the SOL's Order is unclear, but on the face of the Fifth Circuit's decision it appears that the Fifth Circuit relied on the *Brown & Root* doctrine and, at the urging of the SOL, dismissed Mr. Hasan's appeal based on that doctrine. Pet. App. A1-A2.

The SOL essentially duplicated the same error identified in *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984), inasmuch as the SOL *never* performed an independent analysis to determine whether Mr. Hasan's alleged personality conflict constituted sufficient justification to blacklist him from the Comanche Peak site. The issue before this Court is whether Mr. Hasan's internal activity constituted protected activity and, if so, the Secretary necessarily would be required to perform an independent analysis of the record to determine whether the blacklisting of Mr. Hasan was proper.

As the *Mackowiak* Court correctly noted:

> The Secretary's reliance on the ALJ's findings to resolve this ultimate question is flawed. The ALJ concluded that Mackowiak had not engaged in any protected conduct. He did not reach the 'dual motive' analysis required by *Mt Healthy*. Therefore, his findings do not support the Secretary's conclusion. . . . By failing to differentiate between protected and unprotected manifestations of 'bad attitude,' the Secretary rendered review impossible. We must remand for further proceedings.

*Mackowiak*, 735 F.2d at 1164.

The parallels between the instant case and *Mackowiak* are readily apparent. In *Mackowiak,* the legitimate reason for the termination was "attitudinal problems." *Id.,* at p. 1161. Here, the only justification for the blacklisting of Mr. Hasan is an alleged "personality conflict." Pet. App. at p. A13. Like Mr. Mackowiak, who was found to be technically competent, *id.,* Mr. Hasan likewise a competent engineer who received continuous pay increases and better than average performance reviews during his entire tenure at Comanche Peak. Respondent's Brief at p. 7; Court of Appeals Record Excerpts at R. 226; and Claimant's Trial Exhibits 8, 10, 12, and 13.

The *Mackowiak* Court correctly reasoned that it is self-evident that a whistleblower may develop personality conflicts with those who are adversely affected by his whistleblowing activity. *Mackowiak,* 735 F.2d at 1164.[2] The SOL's failure to perform an independent analysis of the record to determine whether Mr. Hasan's protected activity was the cause of the personality conflicts or whether Mr. Hasan was blacklisted in part due to his internal protected activity. This failure would constitute reversible error requiring a remand should this Court determine

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[2] It should be noted that the Fifth Circuit has held that personality conflicts are a natural outgrowth of engaging in protected activity, and could not constitute the sole reason for terminating an employee who engaged in protected activity. *Collins v. Baptists Memorial Geriatric Center,* 937 F.2d 190, 193 n.8 (5th Cir. 1991) ("personality conflict" arising from "protected activities" would "not provide a legitimate reason" for an employee's discharge). *Accord, Kansas Gas & Elec. Co. v. Brock,* 780 F.2d 1505, 1507 (10th Cir. 1985).

that Mr. Hasan's conduct constituted internal protected activity.

Finally, the fact that the issue of the internal protected activity is being raised by the SOL in the 5th Circuit and the Third Circuit, Respondent's Brief at p. 9, constitutes compelling reason for this Court to grant certiorari and resolve this issue.

## CONCLUSION

This Court should grant Mr. Hasan's petition for a writ of certiorari and determine the narrow legal question of whether purely internal safety related complaints are protected under Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. If this Court were to reject the *Brown & Root* doctrine, then this case must be remanded to the SOL for a determination as to whether, "but for" Mr. Hasan's personality conflicts, he still would have been blacklisted from the Comanche Peak nuclear project.

Respectfully submitted,

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